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IN THE

Supreme Court of the United States

October Term, 1962.

No. 75.

MADELINE C. SCHROEDER,
Appellant,

against

THE CITY OF NEW YORK,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

APPELLANT'S REPLY BRIEF.

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THE REPORTER COMPANY, INC., Walton, N. Y.—UN 8-4131—1962

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Additional Statement of the Case.

The appellant is a resident of New York State, although she is also a resident of New Jersey. The complaint states that she and her family reside at the premises in question during the summer and in Dumont, New Jersey, the remainder of the year (R. 8). Her addresses both places were known to the appellee, as will be shown beyond question herein.

POINT I.

The belated claim made by appellee that appellant's address was unknown is not true.

The appellee gave no personal notice, by letter nor in any other manner, to *any* of the property owners along the Neversink River, as the statute did not require the same. Consequently, this claim that appellee was unaware of appellant's address cannot possibly be considered a reason for failing to give some form of personal notice. Instead, it is a much belated excuse which can be seen to be completely untrue for the following reasons:

Prior to the institution of the proceeding, appellee prepared taking maps, and filed a duplicate original in the Orange County Clerk's office on December 5, 1951 (R. 23), a reduced scale copy of same being an exhibit in this case (Def. Ex. A, R. 23).

The index sheet lists the names of the record owners of the parcels taken, and the Court will note that the said Exhibit A, which is the taking map for Neversink Riparian Section No. 4, lists Madeline Schroeder as the owner of Parcel 424.

Sheet No. 10 of this map shows the location of Parcel No. 424 (R. 23, Def. Ex. A) and this Court will note that the various parcels are delineated and the river frontages shown to 1/10th of a foot.

These maps were prepared only after deed studies were made by appellee from which deed studies appellee learned the names of the record title holders and the exact amount of river frontages. Appellant's deed recorded in the Orange County Clerk's office, April 19, 1950, in Liber 1154 of Deeds at page 506 (R. 11, par. 1), contains, alongside her name, her address at 30 Seneca Avenue, Dumont, New

Jersey. Consequently, when appellee learned her name, it learned her address in New Jersey. Since we must assume that appellee knew the location of the property it was taking, it consequently also knew her address at the premises in question in New York.

Referring to another public record, and since tax bills are mailed in the winter, the tax rolls of this property for the years 1951 and 1952 likewise contained the address of 30 Seneca Avenue, Dumont, New Jersey.

The majority opinion of the New York Court of Appeals paid no heed to this fallacious argument by appellee. In fact, the dissenting opinion said:

> "Here personal service is not required and no personal service was made although such a requirement could have been easily met since the City knew that the plaintiff owned the subject property—it had available her address and no reason appears why such a notice could not have been given."

Does the appellee suggest that if it had had an address it would have mailed a notice? No notices were mailed to *anyone*.

In no event is this a case of a missing or unknown owner who has disappeared.

We respectfully point out that it should not be necessary to argue about whether appellant's address was known or unknown. It is sufficient in this case that the *statute itself* makes no provision whatever for any form of personal notice, nor even any attempt at it. It is also obvious that there is no state court construction of this statute requiring any personal notice of any kind, nor of anything additional to what the statutory or language requires. The statute is, therefore, on its face, short of the minimum requirements of due process.

POINT II.

The question of the residence of the appellant is immaterial.

It is shown in this record (R. 8) by allegation in paragraph 11 of the complaint, that the appellant and her family occupied the riparian premises during the summer months of July and August, and resided the remainder of the year in Dumont, New Jersey.

It is therefore apparent, that, aside from the question of domicile, she is a resident of New York as well as New Jersey.

The case of *Huling v. Kaw Valley Railway and Improvement Co.*, 130 U. S. 559 (1889), is relied upon heavily by the appellee, which refers to the case on pages 11, 14 and 15 of its brief. We respectfully submit that this reliance is misplaced.

Appellee urges this Court that since *Huling* condoned notice by publication alone as against a non-resident owner, that this is, therefore, authority for this Court to now hold that notice by publication alone is adequate as against this appellant.

A more careful reading of the *Huling* case gives rise to a different and more accurate interpretation.

In *Huling* the Court held that notice by publication alone was adequate and complied with due process in the case of *residents and non-residents alike.*

The opinion stated at page 563:

> "Of course, the statute goes upon the presumption that, since all the parties cannot be served personally with such notice, the publication, which is designed to meet the eyes of everybody, is to stand for such notice. The publication itself is sufficient

> if it had been in the form of a personal service upon the party himself within the county. Nor have we any doubt that this form of warning owners of property to appear and defend their interests, where it is subject to demands for public use when authorized by statute, is sufficient to subject the property to the action of the tribunals appointed by proper authority to determine those matters."

Thereafter the opinion went on to hold that non residence of the property owner in that case was no excuse for his failure to receive notice in the eyes of the law. It held that because the property owner is out of the jurisdiction of the Court of the state, "he cannot hold his property exempt from the liabilities, duties and obligations which the State has a right to impose upon such property; * * *"

In other words, *Huling* held, as a reading of the opinion will show, that a non-resident was not entitled to any more consideration than a resident. It did not hold that a non-resident was entitled to less consideration than a resident, for in *Huling* the Court said that notice by publication alone was adequate in all cases.

We submit that the contention urged by appellant that personal service is required under the recent decisions of this Court for residents, but is not required for a non resident, would be eminently unfair, and would, we believe, violate the equal protection clause of the Constitution as it would obviously discriminate against a property owner who was a non-resident.

There is no reason to justify such a rule.

Where the address of the property owner is known or where it could be ascertained by merely looking at a deed or a tax roll, what difference does it make if it is an out-of-state or an in-state address? The same postage stamp would carry the notice through the mails to any address. The statute in question on this appeal contains

no requirement, and the state courts construe there to be no requirment, for mailing or any form of personal notice to anyone, resident or non-resident, and the statute provides no requirement for any effort, no matter how slight, to be made to find the address of anyone, resident or non-resident.

It is, therefore, on its face, repugnant to the Constitution.

Appellee indicates that *Walker v. Hutchinson*, 352 U. S. 112 (1956), distinguished *Huling* on the grounds of residence (appellee's brief, pp. 14, 15), the intimation being that *Huling* was still good law today.

The quote evidently referred to in *Walker* is as follows:

> "Decided in 1889, that case upheld notice by publication in a condemnation proceeding on the ground that the landowner was a non-resident. Since appellant in this case is a resident of Kansas, we are not called upon to consider the extent to which Mullane may have undermined the reasoning of the Huling decision."

That *Mullane* undermined *Huling* is beyond question, as *Huling* held that notice by publication alone was adequate as against everyone and *Mullane* held it no longer adequate in modern times. In the above quote from *Walker*, Mr. Justice Black said that the Court was not called upon to consider the *extent* to which *Mullane* undermined *Huling*. However, it is clear that undermine it, it did.

It is also interesting to note that in *Huling* commissioners made an appraisal of the property and awarded to the landowner $725. Considerably more than 1/2 of the property owners in this Neversink proceeding have received nothing and will receive nothing, for the properties taken from them if the appellee's conduct and contentions are upheld by this Court.

We might also point out that it is abundantly clear from the reading of Mr. Justice Jackson's opinion in *Mullane* that no distinction was made between residents and non-residents.

On page 309 of *Mullane* it is stated:

> "The record does not show the number or residence of the beneficiaries, but they were many and it is clear that some were not residents of the State of New York."

Kenneth Mullane had been appointed special guardian and attorney at the time of the judicial settlement for "all persons known or unknown not otherwise appearing who had or might thereafter have any interest in the income of the common trust fund."

We will concede that prior to *Mullane*, notice by publication alone was adequate. However, it was *Mullane* that changed this rule. Mr. Justice Jackson said at page 319:

> "However, it may have been in former times, the mails today are recognized as an efficient and inexpensive means of communication."

Appellant respectfully submits that although she is a resident of New York as well as New Jersey, the question of residence is of no import in this case.

It is of interest to note the manner in which the appellee states the "Question Presented" in its brief to this Court (appellee's brief, p. 3).

It states the question here to be whether the notice is adequate as to a non-resident whose address was not known.

Appellee never so limited its interpretation of the issue before the New York courts.

In its briefs to Special Term, the Appellate Division and to the Court of Appeals, it stated the "Question Presented" as follows:

> "The principal issue here is whether the Water Supply Act is constitutional, especially with respect to the provisions regarding notice to the owners of property taken or affected."

The City, as it can be seen, now, on this appeal, limits the question to whether the notice is adequate with respect to a non-resident and unknown owner.

The Court below held the statute constitutional generally and paid no heed to the appellee's argument of non-residence and ignorance of appellant's address.

Should this Court now hold this statute constitutional, or that due process was accorded this appellant on the grounds of non-residence or that her address was unknown, it would truly complicate the status of this statute.

By far, the majority of the hundreds of late filed claims are by property owners who are residents of New York State. Some, to the knowledge of this writer, even reside at their riparian property the year round. What would happen in a new action by one of such owners? Appellee would then not be able to claim his non-residence, nor that his address was unknown. Would he obtain relief, but his neighbor who winters in New Jersey and whose R. F. D. mailbox stands alongside his, obtain none?

POINT III.

Notice, consistent with due process, of the application to condemn was required in this case, apart from adequate notice to ensure compensation.

Appellee makes the point on pages 21 and 22 of its brief that due process requires adequate notice only on the question of compensation. Its point is that a municipality can condemn property and acquire title without notice to the owner, and that this does not violate due process so long as the owner is (subsequently) given fair notice of his right to be heard as to its value.

Appellee makes this point to refute our argument that in this case, appellant was deprived of her right to be heard as to the extent or reasonableness of the taking.

This is important in that the Court below relied upon an assumed visible effect of the diversion as providing extra-statutory notice here, which diversion did not even take place until more than a year *after* the application was made (see appellant's main brief).

Consequently, if appellant were entitled to notice consistent with due process of the application to condemn, this crutch of extra-statutory notice, as it did not occur until more than a year later, could not be used, and the Court of Appeals would have been clearly in error.

We concede that, as a general rule, a taking of private property by eminent domain can occur without any notice to the property owner, without violating due process, provided that adequate notice is thereafter given to ensure the owner just compensation. However, that rule has no application in this case.

Where the legislature of a state gives to owners of property a certain right in a condemnation statute,

this right becomes an incident of his property, and he cannot be deprived of that right by the condemning municipality, nor by anyone else, without due process.

The Water Supply Act is a statute enacted by the Legislature of the State of New York. This statute provides for notice to be given of the application to condemn (the statute in question here). The application is not *ex parte* under this statute.

This statute, therefore, created in appellant the right to be heard on the return date of the application. Appellant's main brief mentioned how this exact right was used in Section #1 to extract a decretal provision in the order of condemnation requiring releases from the dam.

Appellant could not be deprived of this right, except by due process of law, which requires notice.

An example of the right of a New York property owner, under New York law, to object to the necessity of the extent of the taking, completely apart from the question of compensation, is the case of *Onandaga Water Service v. Crown Mills*, 132 Misc. 848, 230 N. Y. S. 691, also involving riparian rights.

Said case is illustrative of the legal principle that a riparian owner, which the case involved, could object to the extent of the taking aside from any question of compensation.

Said case reiterates the generally accepted principle that only such property as is necessary for the public use can be taken by the power of eminent domain.

Consequently, Madeline Schroeder had the right, under the Water Supply Act, to appear on the return date and object to anything she thought improper in the proceeding, the public necessity, the extent of the rights that appellee sought to acquire (which was actually done by property

owners in Section #1 as explained earlier) or even to the persons being appointed as commissioners.

For more than a year after the return date of the application in this case, there was no diversion. This supposed source of extra-statutory notice was not even in existence at that time.

POINT IV.

There are many inaccuracies in appellee's belief.

There are a number of statements made in appellee's brief which are less than candid.

On page 5, appellee denies that the division of the river into sections by it was arbitrary and points to Section K41-5.0 containing a general direction that a section shall be no larger than that in which one commission can hear all cases in one year. Appellee then says that there were an average of 84 parcels in each section which a commission could reasonably be expected to dispose of in one year.

Section No. 4 has 96 numbered parcels, and, as stated in our main brief (p. 38), at least another 100 properties not shown on the maps but having deed rights to the river. The appellee's brief on page 8 admits the appointment of successor commissions. There were no less than four commission, an original and three successors, in Section No. 4.

The term of one commission is 12 months and each commission on the Neversink has been renewed for an additional eight months, making a total of 20 months. Considering the hiatus between commissions, a figure of two years per commission is fair, and, in this case, four commission were sitting for a period of eight years. Although the taking was in 1952, cases were being tried in 1959.

The statement in appellee's brief on page 5 that one commission can reasonably hear 84 cases is ridiculous. No commission, no matter how active, could reasonably be expected to hear more than 30 cases per year. Had the City intended to comply with the aforesaid direction, Section No. 4 should have actually been nine sections with nine commissions.

Twenty handbills for 30 properties would be a better ratio than 22 handbills for approximately 200 properties involved, which latter was the actual case here. The proof of the inadequacy of the notice here is in the reality of the admitted figures that only 18 of the 96 numbered parcels filed in time and were paid, and the City has acquired the remaining 78 parcels, in addition to a great number of other parcels involving upland properties with deed rights to the river, without paying any compensation at all.

The statement "that appellant did not allege that she was unaware of the diversion" appearing on page 9 of the appellee's brief, is nothing more than a play on words.

The complaint, in which all of the allegations must be deemed true on this motion, leaves no doubt as to appellant's lack of knowledge. This should certainly not be surprising in view of the fact that 81% of the riparian owners of numbered parcels in Section 4 failed to file in time (R. 10).

The complaint alleges (R. 9) that appellant never read or saw any copies of the New York City advertisements nor that she customarily purchased any New York City newspapers nor of Orange County, and that she never observed any handbills anywhere, and that at no time prior to her retention of counsel, "did plaintiff learn

or know that the City of New York had acquired possession of her property and that she had a right to claim against the City of New York." The complaint further states on the same page that she has never been at any time notified in any manner that appellee sought to acquire its rights in the Neversink nor has she ever been served with summons nor given any other personal notice of any kind whatsoever. The complaint further states (R. 10) that notice was by publication only and that appellant "had no knowledge, either constructive, actual or implied" of such proceeding prior to her retention of counsel.

We have stated in the main brief why it is that a layman could not determine from observing the river itself that its condition was caused by an artificial diversion at a dam 25 miles upstream, and in a different county. Appellant never did, and certainly does not in this case, admit any knowledge whatever that she knew that there had been a diversion.

The *Nelson* case relied upon by the City on page 11 of its brief is not in point in that the statute there required mailing. A reading of the case further shows substantial notice actually had by the appellant in conformity with the statutory requirements of mailing tax bills, etc.

Appellant does not "intimate" that appellee knew appellant's address, as stated in appellee's brief on page 12.

Appellant affirmatively states this to be an indisputable fact as shown earlier in this brief.

Appellee seeks to distinguish publication and posting in this case. However, the use of handbills cannot be considered "posting" in the same sense as the word is otherwise used.

It is true that in certain cases posting is authorized and stands in the place of personal service. However, this is only so in those cases where the posting is done in such a manner as to constitute, and its purpose is to constitute, substituted *personal* service. For example, Section 230 of the New York Civil Practice Act provides that substituted service on certain defendants may be made pursuant to a Court order *upon satisfactory proof that the plaintiff will be unable to make personal service*. Section 231 provides that the court order must direct that the summons be served by service upon substituted persons connected with the defendant or, if the same cannot be accomplished, by affixing the summons to the door of defendant's place of business, office or residence and, in addition thereto, the mailing of same to the defendant at his office or place of business or place of residence. It is only where proof is shown that even the foregoing service cannot be made, that a Court may direct some other form of substituted service.

So, too, in other cases the papers are affixed or posted on the *res* itself or actual physical possession of the *res* is taken.

In the instant case, had the statute provided for a notice to be posted on the dwelling of *each* property affected, or in a conspicuous place on *each* property, the statute would stand on a better constitutional footing, although we believe it would have still been inadequate without requiring some attempt at personal service.

However, the affixing of handbills in remote places cannot be in any sense considered any form of *personal*

notice particularly since it is not connected with any particular parcel of property, fails to mention the name of any person affected, fails to mention anything about the need to file a claim, where, when or how. This broadcast type of notice must be ineffective, when done in midwinter in the forested lanes along the river, in a summer occupied area.

It is interesting to note, for example, that on page 19 of appellee's brief, referring to the *Richle* case, an attorney did not even know where and how to file a claim. Parenthetically, this *Richle* case is also a representative case involving a large number of late filed claims.

There is truly no reason to therefore distinguish the handbills from the newspaper advertisements. Both are merely different forms of publication. There is nothing "personal" with respect to either.

Appellee does not even claim the handbills to constitute any form of personal notice. Whichever view is taken, the service here was purely and entirely constructive, and there is no reason for it to have been constructive in a condemnation proceeding where known real estate was being acquired.

The fact that a handbill was attached to a tree in January at the end of a road more than 1200 feet from appellant's property as alleged on page 15 of appellee's brief, should not entitle the appellee to have this Court believe that this handbill remained long enough on this pole and survived the elements and was read by appellant. Further, there is no requirement in this statute that this handbill be affixed in this manner at this place, nor of the material used; and to assume that this provided any actual notice is gross speculation.

We agree that a Court can take judicial notice of a geographical fact, as stated on page 16 of appellee's brief. However, that of which the Court takes judicial notice must be, in the first instance, an accepted fact.

Assuming, *arguendo* only, that the visibility or apparency of the diversion and its cause was a "geographical" matter, its status as a "fact" in this case is certainly dubious.

A court Can take judicial notice that Philadelphia is in Pennsylvania, but should not on the grounds of a "geographical fact", take judicial notice that it is in Ohio. There is absolutely no reason in this record for the Court below to have assumed that the diversion gave actual notice, since it was not alleged by appellee in its pleadings and strongly denied in the briefs of appellant when alleged in the City's briefs.

Neither the size of the reservoir, 25 miles distant from the subject property; nor the United States Supreme Court decrees, nor any isolated newspaper mention of same in any respects, should be considered adequate to have advised this appellant of the taking of her property and that it was incumbent upon her to file a claim between the specific dates of June 9th, 1952 and June 9th, 1955.

The case of *Wuchter v. Pizzutti*, 276 U. S. 173 (1928), was not in any sense inconsistent with *Mullane*, as urged on page 20 of appellee's brief.

Nor did Justices Brandeis, Holmes and Stone dissent upon the grounds urged by appellee.

The dissent of Mr. Justice Brandeis, in which Mr. Justice Holmes concurred, was upon the grounds that there was no statutory construction by the New Jersey

Court before the Supreme Court. The dissent stated that the New Jersey Court might have construed the statute in question as requiring mailing and that it was even probable that the New Jersey Court would have so construed the statute, in which case, since there was actual mailing, the statute would be constitutional.

The dissent further pointed out that it might have been the general practice to mail process, and that such administrative construction would carry much weight with the New Jersey Court. This dissenting opinion expressed the view that the case should be remanded to the State Court for the purpose of determining whether the statute actually required mailing by the State Court's interpretation.

Mr. Justice Stone's dissent was also upon these grounds.

It is also, however, correct to say that the concluding paragraph of the dissenting opinion also mentioned the fact that the defendant had actual notice and an opportunity to defend, citing a number of cases in which appear situations where complaining parties had appeared in the proceedings.

Appellant pointed out in its main brief on page 33 that there are two exceptions to the *Wuchter* rule, one being where there has been an appearance in the proceedings, and the other being where the state Courts have construed the statute to require actual notice, neither of which is the case here.

Mullane held nothing the least bit inconsistent with *Wuchter*. *Mullane* was decided on the grounds of the absence of the requirement of mailing in the statute, and did not turn upon or deal with whether or not mailing or any other form of actual notice was actually given.

In *Mullane*, at page 319, the Court said that "The *statutory* notice to known beneficiaries is inadequate, not because *in fact* it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand" (emphasis added). On page 320, in concluding, the Court said: "We hold that the notice of judicial settlement of accounts *required* by the New York Banking Law, §100-c (12) is incompatible with the Fourteenth Amendment as a basis for adjudication depriving known persons whose whereabouts are also known of substantial property rights" (emphasis added).

The Court in *Mullane* held that the statute, *on its face*, as to known beneficiaries, was repugnant to the Constitution.

The questions of estoppel, laches, waiver, or acquiescence, are not issues before this Court. These defenses raised by appellee in its answer to the complaint were matters to be decided by the state Court under applicable state law.

The New York Courts have ruled these defenses in this case to be without merit in that all New York Courts dealing with this case have gone directly to the constitutional question. Had any of these defenses been meritorious, it would not have been necessary for the Courts below to have gone beyond sustaining any of same. In fact, the dissenting Judges of the Court of Appeals said:

> "The judgment appealed from should be reversed, with costs in all courts, and plaintiff's cross-motion for judgment on the pleadings granted" (R. 52).

Appellant has not abandoned her request for an injunction as stated by appellee on page 24 of its brief.

Appellant has been frank and candid in its brief in pointing out that if this case is reversed the City will not be required to abandon its water supply project, but would merely have to give further notice and permit property owners to present their claims for damages, and to pay such damages as would be judicially determined. She merely states, in effect, that she would be satisfied with such relief.

However, this action is nevertheless one for an injunction placing the question of title in issue. Such question of whether or not the City of New York has acquired title, in turn, depends upon the determination by this Court of whether the notice provided by the statute was adequate and fair enough to comply with due process.

All here agree that an established legal principle applicable is that the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

The law is not a true science. We know that the decision of a Court cannot be mathematically computed in advance.

However, on occasion we see a case where certain mathematical information can be set alongside an accepted legal principle, and whether or not they are in harmony can be measured. This is such a case.

Let us take the above legal principle and lay alongside of same the fact that more than one-half of the owners of numbered parcels failed to file in time, even discounting the upland property.

Let us consider the figures in Section #4 where 81% of the owners of numbered parcels (discounting upland property) did not file in time.

Can it be that these figures are in harmony with the aforesaid accepted doctrine of law?

CONCLUSION.

It is respectfully submitted that this statute is inconsistent with even the barest and minimum requirements of due process guaranteed by the Fourteenth Amendment.

Respectfully submitted,

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